Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-296

DUANE OWEN HESTNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO VACATE JUDGMENT AND REMAND TO LOWER COURT AND SUPPORTING BRIEF

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COMES NOW the petitioner, DUANE OWEN HESTNES, by his attorney, JAMES M. SHELLOW, and, upon the Petition for a Writ of Certiorari previously filed and upon the affidavit of counsel annexed hereto, respectfully moves this Court for the entry of an order vacating the judgment of the United States Court of Appeals for the Seventh Circuit and remanding the matter to the court below for reconsideration in light of the document marked as Exhibit A to counsel's affidavit.

The facts upon which this motion is based are set out more fully in the Petition for a Writ of Certiorari previously filed and in the affidavit of counsel below. In particular, one of the issues upon which the petitioner

is seeking review in the United States Supreme Court relates to the refusal of the trial court to permit the petitioner to offer the testimony of a second expert witness. In affirming the conviction, the United States Court of Appeals for the Seventh Circuit held that the exclusion of the testimony was an appropriate exercise of discretion under Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony. In his Petition, petitioner seeks review of this holding as a conflict with other decisions of this Court and other Courts of Appeals dealing with the right of a defendant to offer the testimony of witnesses in support of his theory of defense.

Following the conviction sought to be reviewed herein, the petitioner was tried on another charge in the same court, before the same trial judge represented by the same trial counsel. In the second case, the trial judge, *sua sponte,* issued a memorandum which indicates that his refusal to permit the testimony of the second expert witness in the first trial was a sanction for the cross-examination of other witnesses that the court considered to be too lengthy. The opinion of the Court of Appeals does not address the issue of the exclusion of the testimony of one witness as a sanction for cross-examination of other witnesses. Accordingly, petitioner is moving this Court for an order vacating the judgment of the Court of Appeals and remanding the case for consideration of this issue.

Respectfully submitted,

DUANE OWEN HESTNES,
Petitioner
By SHELLOW & SHELLOW

James M. Shellow

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

JAMES M. SHELLOW, being first duly sworn, on oath hereby deposes and says that:

1. He is an attorney licensed to practice law in the State of Wisconsin and has been admitted to practice in the United States Supreme Court.

2. He represented the petitioner, Duane Owen Hestnes, as trial counsel in the case entitled *United States of America v. Duane Owen Hestnes,* Case No. 76-CR-3, tried in the United States District Court for the Western District of Wisconsin, the Honorable James E. Doyle, District Judge, presiding. The Petition for a Writ of Certiorari previously filed by the petitioner seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit affirming the conviction in this case.

3. One of the issues upon which a review is sought by petitioner relates to the refusal of the trial court to permit him to present the testimony of a second expert witness. The United States Court of Appeals held that the refusal to permit this testimony was an appropriate exercise of discretion under Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony.

4. Your affiant also represented the petitioner, Duane Owen Hestnes, as trial counsel in a subsequent case entitled *United States of America v. Duane Owen Hestnes,* Case No. 77-CR-23, in the United States District Court for the Western District of Wisconsin, the Honorable James E. Doyle, District Judge, presiding. The trial in the second case commenced on August 24, 1977. On Au-

gust 25, 1977, the trial judge, *sua sponte,* issued a document, a copy of which is annexed hereto marked as Exhibit A, and which was identified in Case No. 77-CR-23 as Court Exhibit #5.

5. The transcripts of the trial in Case No. 77-CR-23 are being prepared by the court reporter but are not yet available. However, the trial judge made it clear on the record in Case No. 77-CR-23, that the earlier trial referred to in Exhibit A was the trial in petitioner's earlier case, Case No. 76-CR-3.

6. Exhibit A indicates that the trial judge refused to permit the petitioner to offer the testimony of the second expert witness in Case No. 76-CR-3 as a sanction for cross-examination of other witnesses that the trial judge considered to be too lengthy.

7. The trial judge gave petitioner no advance warning in Case No. 76-CR-3 that it considered a limitation on the number of defense witnesses as an appropriate sanction for cross-examination of other witnesses which the court deemed to be unreasonably lengthy.

James M. Shellow

Subscribed and sworn to before me

this ..... day of October, 1977.

.....
Notary Public, Milwaukee County, Wis.
My Commission .....

EXHIBIT A

United States v. Hestnes, 77-CR-23 8/25/77

In the course of an earlier trial in which Mr. Shellow appeared for a defendant, a circumstance arose near the conclusion of the trial in which I prevented the defendant from calling an additional witness. I consider this an unfortunate event. It occurred because of what I considered at the time a necessity to keep the length of that earlier trial within reasonable limits. In taking that action, I was influenced by my view that frequently during the trial, Mr. Shellow had engaged in cross-examinations for unreasonably long periods of time. Those repeated occasions could be fairly characterized as the pursuit of points in interrogation at lengths utterly inappropriate to their intrinsic importance in the trial, at lengths far beyond those reasonably appropriate to efforts to diminish the witness's credibility.

In the present trial I consider that Mr. Shellow is displaying a similar tendency. In the present trial, I hereby give the defense prompt notice that if this becomes a pattern of behavior, I may elect to deal with it in two ways: The first is to intervene from time to time, frequently if necessary, to limit cross-examination on particular points. The second is to limit direct examination of defense witnesses and, if necessary to limit the number of defense witnesses, in order to compensate for the excessive duration of cross-examination during the government's case.

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BRIEF IN SUPPORT OF MOTION TO VACATE JUDGMENT OR REMAND

As described more fully in the Petition for a Writ of Certiorari, the primary issue at the trial was the adequacy of the government's proof of the identity of the substances allegedly delivered by the petitioner. One of the grounds upon which the petitioner is seeking review of the judgment of the Court of Appeals in this Court relates to the refusal of the trial court to permit the petitioner to present the testimony of a second expert witness. The government's chemist and an expert witness called by the petitioner offered conflicting opinions as to the suitability of one of the tests performed by the government's chemist for distinguishing the substances delivered from non-controlled substances. The trial court refused to permit the petitioner to offer the testimony of a second expert

witness in support of the petitioner's position that the test performed by the government's chemist was not an appropriate test. In its opinion affirming the conviction, the Court of Appeals held that the refusal of the trial court to permit the testimony of the second expert witness was an appropriate exercise of discretion under Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony.

After the Court of Appeals affirmed the conviction and denied petitioner's motion for reconsideration, the petitioner was tried in a second case before the same trial judge represented by the same trial attorney. On the second day of this second trial, the trial judge, *sua sponte,* issued a document making reference to the exclusion of the testimony of the second expert witness in the first trial. That document, marked as Court Exhibit #5 in the second trial and reprinted herein as Exhibit A to counsel's affidavit, explains that the exclusion of the testimony of the second expert witness was imposed as a sanction for what the court considered to be frequent "cross-examinations for unreasonably long periods of time."

The document issued by the trial judge in the second trial significantly alters the posture of the case presently before this Court for review. Implicit in the Court of Appeals' decision that the trial judge properly exercised discretion given him by Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony is the assumption that the trial judge in fact exercised discretion under that Rule. When a trial court makes a discretionary decision, appellate review is limited to a determination of whether the discretion was abused. Appellate review is not so limited, however, when it appears that the trial

court did not exercise discretion at all. *Cf. Yates v. United States,* 356 U.S. 363 (1958).

The opinion of the Court of Appeals presents the following issue: whether, in light of a criminal defendant's Sixth Amendment right to offer testimony in support of his theory of defense, it is an abuse of a trial court's discretion under Rule 403 to exclude the testimony of a second defense expert witness on a critical issue upon which the government and the defendant have each offered conflicting opinions of a single expert. Now that the trial court has issued an explanation for its decision to exclude the testimony of the petitioner's second expert, the case presents a different set of issues. The first issue is whether a trial court has authority under any circumstances to exclude the testimony of a witness called by the defense as a sanction for cross-examination of prosecution witnesses which the trial court concludes was too lengthy. It is difficult, if not impossible, to read such an authority into Rule 403. Petitioner has been unable to find any reported decision which discusses, let alone approves, such a sanction. The second issue presented, assuming such a sanction is available, is whether, under the particular circumstances of this case, the sanction was appropriately exercised.

The Court of Appeals, acting without the benefit of the trial court's recent explanation for its decision to exclude the expert testimony, does not address these issues in its opinion. In light of the trial court's explanation, it no longer seems appropriate for this Court to review the issue of the exclusion of the expert testimony in terms of the authority provided by Rule 403 to exclude cumulative testimony. Nor does it seem appropriate to ask this

Court to consider the issue of the exclusion of defense testimony as a sanction for cross-examination deemed by the trial judge to be too lengthy absent consideration by the Court of Appeals. What does seem appropriate is to remand the case back to the Court of Appeals for reconsideration in light of the trial court's recent explanation for its action. For this reason, petitioner respectfully presents to this Court his motion to vacate the judgment in this case and remand the matter back to the Court of Appeals for reconsideration of the issue of the exclusion of the expert testimony.

Respectfully submitted,

JAMES M. SHELLOW
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222 East Mason Street
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